No. 10,360

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILWAUKEE MECHANICS' INSURANCE COMPANY (a corporation),
Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA (husband and wife),
Appellees.

APPELLANT'S REPLY BRIEF.

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STATEMENT OF EVIDENCE.

Appellees complain[1] that the evidence "is not fully stated by appellant"; and then profess to detail what "the facts fully stated are". But appellees' profession and performance do not coincide, as can be readily demonstrated.

(a) Appellees begin with two pages[2] of a highly selective and wholly incomplete summary of Questa's testimony on direct examination. Unfavorable facts and discrepancies, with which Questa's testimony

[1] P. 1.

[2] Pp. 1, 2, and the first half of p. 3; comprising appellees' notes numbered 1 to 15, inclusive.

abounds, are simply ignored; and no reference is made to any part of the cross-examination.

(b) Next follows a short summary[3] of the testimony of appellees' expert, Mr. Williams. Indeed, it is so short, so incomplete, and so inaccurate, that it can hardly be called a summary. The sentence preceding appellees' notation "(18)" is unintelligible; and, so far as we can understand it, appears to be inaccurate with relation to the concrete piers.[4] The sentence preceding appellees' notation "(20)" seems designed to convey the impression that the fire occurred during the progress of repair work on the barn. This is incorrect for, although the record is silent on the date, the floor and stalls had been removed from the barn two or three years before the fire and had never been replaced. Again, all of Williams' testimony on cross-examination is ignored.

(c) Following this are a very few carefully chosen excerpts[5] from the testimony of appellant's agent and witness, Mr. Hassett. Hassett was one of the primary actors in the transactions here involved and he testified at length concerning them; appellees have not attempted to "fully" state his evidence, nor have they fairly stated it.

(d) Finally, appellees note[6] that witnesses Parish and Corica testified "that 11 days before the fire that Questa told them the barn was not insured". Ap-

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[3]P. 3; notes numbered 16 to 20, inclusive.

[4]See our opening brief, p. 31, and footnotes 142-3.

[5]Pp. 3 (last five lines), 4, and 5 (first four lines); notes numbered 21 to 25, inclusive.

[6]P. 5; note numbered 26.

pellees bluntly assert that this testimony "is entirely refuted by Questa and Ex. H". The assertion is unwarranted.[7]

I.[8]

Appellees do not deny the discrepancy between the contract pleaded and that found by the trial court. They argue that a variance must be substantial and material and must mislead.

With these principles we have no quarrel, but we submit that the difference between a contract of insurance in the amount of $4000 and one in the amount of $7500 is obviously both substantial and material. It is equally obvious that appellant was misled to its prejudice since the contract found was neither pleaded nor proved, and appellant had neither opportunity nor occasion to present to the trial court its position with regard to the possibility of existence of a $4000 contract.

In *Johnson v. DeWaard,* 113 CA 417, 298 P 92, 94,[9] it is said:

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[7]See our opening brief, pp. 21-3, summarizing the testimony of Parish and Corica, and the attempted rebuttal thereof.

Exhibit "H" (R 233-4) has no bearing whatever on the date on which the conversation occurred between these witnesses and Questa. It is merely the agreement of sale of the hay; it recites that some of the hay is already in the barn, and some is to be put there in August. In fact, Exhibit "H" tends to corroborate what is indisputably established by Exhibit "5" (R 205-6), that Mrs. Cupit first applied for insurance on August 15th, about the time the additional hay was added.

[8]Our opening brief (pp. 8 ff.), Argument, I—Variance between contract pleaded and contract found.

[9]Cited by appellees, p. 6.

There is nothing frivolous about the requirement of findings imposed by Rule 52, *FRCP*.[16]

With reference to the terms of the alleged oral contract, it is significant that appellees offer no suggestions to aid this Court in interpreting the findings. One may assume that this was because appellees knew not at which horn of the dilemma to grasp. If they argued that the trial court intended to find an oral contract for insurance in the amount of $4000, this would be tantamount to an admission that the finding of the existence of any oral contract of insurance was clearly erroneous;[17] for the reason that such finding must rest on the testimony of appellee Questa alone, and he testified to an oral contract in the amount of $7500. If, on the other hand, appellees contended that the trial court intended to find an oral contract in accordance with Questa's testimony of $7500 insurance, it would become immediately and indisputably

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[16]*Saginaw Broadcasting Co. v. Fed. Communications Commn.* (App. DC) 96 F2 554, 559; cd, 305 US 613, 83 LEd 391:

> "The requirement that courts . . . shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court . . . , so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations . . . The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law."

[17]As argued by appellant; opening brief, Argument, III, pp. 13 ff.

apparent that the findings are faulty, uncertain, and ambiguous.

Having brushed aside with a mere shrug[18] our argument that there is no sufficient finding of the terms of the oral contract, appellees devote the bulk of their argument[19] to the matter of the finding on the amount of loss sustained. Again, however, they offer no interpretation of the findings on this point.[20]

Appellees insist[21] that Questa was competent to testify to the value of his barn, and that Williams was qualified to testify to replacement values because he was "a carpenter and contractor". None of this has any bearing at all on whether the judgment is supported by the findings.[22]

Appellees place reliance[23] upon a quoted headnote from *Hegard v. California Ins. Co.,* 2 CU 663, 11 P 594, which appears to support the view that a finding of loss sustained is sufficient, and that the trial court need not make a finding on the value of the building at the time of its destruction. We controvert the validity of this citation as authority on the following

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[18]Appellees' brief, pp. 8-9.

[19]Pp. 9-14.

[20]It would be of interest to know appellees' explanation of the amazing coincidence implicit in the assumption that the amount of the oral contract of insurance (which Questa insisted was $7500) was $4000, and the value of the barn destroyed was also exactly $4000 (—a barn whose value, according to Questa, was $15,000 or perhaps $8000 [See, opening brief, pp. 26-7], and whose replacement cost was $15,000 according to Questa or perhaps $10,609.31 according to Williams [See, opening brief, pp. 26, 31]).

[21]Pp. 11-12.

[22]It relates only to Argument, IV; our opening brief, pp. 25 ff.

[23]P. 13.

grounds: (a) The pertinent language is found, not in a court opinion, but in a commissioners' decision rendered in 1886; (b) The remark was obiter dictum, since the commissioners recommended reversal for evidence improperly admitted; (c) A department of the California Supreme Court accepted the commissioners' decision, but the Supreme Court in bank granted a rehearing (72 C 535, 14 P 180) and wrote a new opinion, omitting any consideration of the sufficiency of the findings, and affirming the trial court's judgment as reduced by consent of the parties; (d) The commissioners' decision has never been cited as authority by any court on the point as to which it is relied on by appellees; (e) On this point, the dictum from the commissioners' decision is clearly erroneous.

It is well settled that a complaint in an action such as this must allege the value of the property destroyed, and that an allegation of the amount of loss or damage sustained is not an allegation of value.

3 *Bancroft's Code Pleading* 2616;

Emigh v. State Ins. Co. (Wash.) 27 P 1063, 1064;

Cross v. Home Ins. Co. (CC, ND Cal.) 154 F 679, 680;

Connecticut Fire Ins. Co. v. Williams (Okla.) 264 P 881, 882.

Appellees do not dispute this.[24] But they point out[25] that failure to allege value is cured by admission of

[24]Indeed, they cite (pp. 9-10, 12) the first two authorities given above.

[25]Pp. 9-10.

evidence as to value, and that Questa testified as to value without objection.[26] Granting all this, it has no bearing whatever on the sufficiency of the findings to support the judgment. As pointed out in our opening brief[27] there is no sufficient finding of the value of the property destroyed.

Appellant is entitled to know with certainty the basis of the trial court's decision on each of the two fundamental issues presented at the trial. We suspect that the trial court attempted to approximately "split the difference" between the $7500 claimed by appellees and the denial of any liability by appellant, in rendering judgment for $4000. This conclusion is fortified by the absence from the record of any supporting evidence that the amount of the contract was $4000 or that the amount of the loss by fire was $4000; by the strange circumstance that both the amount of the contract and the amount of the loss (neither of which had any bearing on the other) strangely turned out to be precisely identical figures; and by the use of the hesitant phrase "not less than" in memorandum opinion, findings, and judgment with relation both to the amount of the contract and the amount of the loss.

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[26]Questa was obviously competent to testify to the value of his own property, and an objection on the ground that value had not been properly pleaded would merely have resulted in an amendment to the complaint. Appellant's motion to strike Questa's value testimony was based upon far more substantial grounds than a mere technicality of pleading. (See our opening brief, Argument, IV, pp. 26-28.)

[27]Argument, II, pp. 10-13.

III.[28]

Appellees seem to attach considerable importance to the following bit of testimony given by Hassett:[29]

> "Q. Mr. Hassett, was any amount mentioned as regards the amount of premium or rate? A. No, he [Questa] never inquired the rate, in fact he never asked me the rate for anything, just placed the insurance and we wrote the policy."

Appellant has never raised the point that the relations between the parties were such as would prevent agreement by implication on certain features of an oral contract of insurance; for example, no doubt it could have been implied that the parties intended the standard form of fire insurance policy, the usual premium rate, and the customary length of term. However, it is still essential that there must have been a meeting of the minds on *the amount of insurance* to be written.

The barn had not been insured since "way back before the depression", according to Questa,[30] and then for an unknown amount and in an unnamed insurance company. Clearly, therefore, either the parties expressly agreed upon the amount of insurance in so many words, or there was no meeting of the minds

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[28]Our opening brief (pp. 13 ff., Argument, III—Findings clearly erroneous as to existence and terms of contract.

[29]R 160. Appellees' brief contains this identical quotation from the record no less than four times—pp. 4, 17 (twice), and 18.

[30]R 58-9.

and hence no contract.[31] It follows that the authorities cited by appellees[32] to the proposition that the terms of an oral contract of insurance may sometimes be implied from the circumstances, are inapposite. The proposition is elementary; but it does not aid appellees' case.

Appellees quote[33] Hassett's testimony to the effect that since the fire it occurred to Hassett that perhaps Questa intended Hassett to go to the ranch and place whatever amount of insurance he (Hassett) thought proper on the barn; and that, if he had so understood Questa at the time, he might have written $2000 insurance on the barn.[34] We note: (a) Hassett

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[31]This is not to say that the amount of insurance may not be implied under certain circumstances. Where property has been previously insured by the same agent or where it appears that the agent knew the amount of insurance customarily carried by the owner on that property, and where the other elements of an agreement to insure are found, an oral contract might result even though neither party made specific mention of the amount of insurance to be written. But such was not the case here.

[32]Pp. 14-15.

[33]Pp. 4-5; and again, pp. 17-18.

[34]Appellees, however, have not quoted the record accurately. We do so now, italicizing the portions omitted by appellees (R 160-1):

"Q. Did you at any time, prior to the fire, write out any covering note or memorandum of insurance with regard to this barn? A. No, I did not, but since that time and after getting better acquainted with the way the people talk, I think maybe I should have made a mental memorandum.

Q. For how much insurance? A. Well, I think—in other words, I think if I got out there deliberately to write the insurance, I could have written another two thousand dollars.

Q. Was the amount of two thousand dollars ever mentioned between you and Mr. Questa prior to the fire? A. No, no amount was mentioned until after the fire.

The Court: Just a moment. I didn't exactly understand one expression of the witness. I would like to have you

was definite that no amount of insurance had been mentioned prior to the fire by either Questa or himself; (b) Hassett's testimony that, after the fire, he thought he might have written $2000 insurance on the barn had he understood Questa differently, certainly does not furnish confirmation of Questa's testimony that there was a meeting of the minds at the figure of $7500, nor does it support the $4000 figure embodied in the trial court's findings.

IV.[35]

The respective qualifications (or rather lack of qualifications) of Questa and Williams to testify to replacement cost of the barn are sufficiently treated in our opening brief. The authorities cited by appellees[36] are not in point.

Significantly, although appellees assert[37] that Questa "stated its [the barn's] value", the worthlessness of Questa's "value" testimony is conclusively

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explain what you mean by 'mental memorandum'. A. Well, after growing better acquainted with Silvo as time went on, I think what Silvo meant for me to do the first time I met him was to go out and see the barn and whatever I thought right for it I should write on it without any further conversation with him and I didn't, unfortunately, understand his language at that time.

Q. You have related the conversations, I take it, Mr. Hassett, as they occurred, to the best of your recollection?

A. Yes sir.

Q. And what you said just now to the Judge is something you have thought about the conversations in your own mind later? A. Correct."

[35]Our opening brief (pp. 25 ff.), Argument, IV—Evidence and findings on amount of loss by fire.

[36]Pp. 20-3.

[37]P. 21.

shown by appellees' own summary[38] of that testimony:

> "Questa stated . . . that he valued the barn at fifteen thousand dollars and he stated it would cost fifteen thousand dollars to replace the barn." [!]

Appellees twice intimate that the blueprints of the barn (Exhibit "B"), although prepared by Williams, were properly admitted in evidence on the basis of Questa's testimony even if not on that of Williams.[39] This is untenable. Questa was the first witness called, and on his direct examination the following occurred:[40]

> "Q. Now this particular drawing that I show you, is that a reproduction of the barn? A. Yes.
>
> Q. That is a reproduction as you remember it? A. Yes.
>
> Q. And is there any doubt in your mind as to any of the sizes of timber, etc. that were placed herein? A. No. I think that is a perfect reproduction of the barn.
>
> Mr. Boyle: We offer these particular drawings for identification, your Honor. Mr. Levit had the privilege of going over a set of the plans.

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[38]Pp. 2-3.

[39]Appellees say (p. 20):

> "Upon the testimony of Questa that plans were reproductions which had been admitted in evidence as plaintiff's Ex. E., page 113 of transcript, and no objection was interposed." [This is an exact quotation from appellees' brief. The exhibit reference is erroneous; the plans are Exhibit "B".]

And, again (p. 21):

> ". . . And [Questa] having stated . . . that the . . . drawings were correct . . ."

[40]R 41-2. This is the only testimony of Questa relative to the blueprints.

Mr. Levit: In the first place I make an objection to the admission of those blueprints.

Mr. Boyle: They are only offered for identification, so there is no use objecting.

Mr. Levit: Then we withdraw the objection . . .

Clerk: Plaintiffs' B for identification."

There was no further reference to the blueprints until Williams took the stand and identified them, and they were admitted in evidence as Exhibit "B".[41] When cross-examination developed Williams' complete lack of familiarity with and knowledge of the barn, appellant moved to strike the blueprints and the balance of Williams' testimony.[42] The motion to strike should have been granted.[43]

Dated, San Francisco, California,
June 9, 1943.

Respectfully submitted,
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[41]R 113.
[42]R 131.
[43]See our opening brief, pp. 29-31.